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April 1, 2010

California Energy Commission
Attn Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Genesis Solar Energy Project; 09-AFC-8

Dear Docket Clerk:

Enclosed are an original and one copy of **CALIFORNIA UNIONS FOR RELIABLE ENERGY STATUS REPORT NUMBER 3**. Please docket the original, conform the copy and return the copy in the envelope provided.

Thank you for your assistance.

Sincerely,

/s/

Carol Horton
Assistant to Rachael E. Koss

:cnh
Enclosures

2364-041d

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

The Application for Certification for the
GENESIS SOLAR ENERGY PROJECT

Docket No. 09-AFC-8

**CALIFORNIA UNIONS FOR RELIABLE ENERGY
STATUS REPORT NUMBER 3**

April 1, 2010

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UNIONS FOR RELIABLE ENERGY

California Unions for Reliable Energy (“CURE”) submits this third status report pursuant to the Committee’s December 22, 2009 Scheduling Order. On March 12, 2010, CURE submitted comments on the Mojave Desert Air Quality Management District’s Preliminary Determination of Compliance for the Genesis Solar Energy Project (“Project”). CURE submitted data requests regarding biological resources and groundwater resources on March 11, 2010 and March 29, 2010, respectively. CURE also participated in the March 18, 2010 status conference. CURE is currently evaluating the Staff Assessment and Draft Environmental Impact Statement (“SA/DEIS”), which was released on March 26, 2010.

CURE remains concerned about numerous significant, unresolved issues, which CURE has explained are not addressed in the Application for Certification and which, accordingly, are not addressed in the recently released SA/DEIS. For example, the Applicant has failed to provide critical information about the Project’s environmental setting, significant impacts and required mitigation for two of the core resource areas impacted by the Project: soil and water resources and biological resources. Without this information, Staff simply cannot provide an adequate basis for the Committee to make the findings required for certification of the Project (e.g., compliance with all laws and regulations, and adequate mitigation of impacts); and, consequently, the SA/DEIS is incomplete. Until this threshold information is provided, it would be unreasonable for the Applicant to expect the Commission,

Staff, and other parties to expend valuable resources on testimony and evidentiary hearings.

Soil and Water Resources

One of the most significant unresolved issues is the Applicant's proposal to use groundwater for power plant cooling. According to the February 2, 2010 Genesis Solar Energy Project Committee Decision and Scoping Order, State water policies mandate that the Applicant "use the least amount of the worst available water, considering all applicable technical, legal, economic, and environmental factors."¹ Because the Project proposes to use groundwater for power plant cooling, the SA/DEIS concludes that the Project does not comply with the State's water policies.² Specifically, the Project's proposal fails to "use the least amount of water available"³ because the Applicant does not propose to use dry cooling even though dry cooling is feasible. The SA/DEIS attempts to reconcile the Project's inconsistency with LORS with Condition of Certification SOIL&WATER-18 which states *in full*:

SOIL&WATER-18 Pending agreement on the actions needed to bring the project into compliance with the water policy.⁴

Clearly, this condition is meaningless. It provides no information to the public that would enable any meaningful review of the proposed condition. The plain language of Condition of Certification SOIL&WATER-18 clearly illustrates that the Project's

¹ Genesis Solar Energy Project Committee Decision and Scoping Order, February 2, 2010, p. 3.

² SA/EIS, p. C.9-116.

³ SA/EIS, p. C.9-88.

⁴ SA/EIS, p. C.9-110.

proposed use of groundwater for power plant cooling is a significant, unresolved issue.

The SA/DEIS alludes to future discussions between Staff and the Applicant regarding a panoply of suggestions to bring the Project into compliance with LORS, none of which are analyzed or required in the SA/DEIS. For example, the SA/DEIS suggests dry cooling, hybrid cooling, a ZLD system, project design changes to increase water use efficiency, payment for irrigation improvements, purchase of water rights in the Colorado River, funding of Tamarisk removal, and “other water conserving activities.”⁵ However, most of these suggestions would fail to ensure that the Project will use the least amount of the worst available water. The SA/DEIS concludes that dry cooling is feasible for the Project. And, importantly, future discussions – after release of the SA/DEIS – regarding major Project changes and/or mitigation measures mandate that the SA/DEIS be revised and recirculated for public review.

The SA/DEIS also concludes that the Project’s proposed groundwater pumping may be illegal and will significantly impact the adjudicated Colorado River because “the Project has the potential to divert Colorado River water without any entitlement to the water, and all groundwater production at the site could be considered Colorado River water.”⁶ The SA/DEIS does not resolve the Project’s pumping of Colorado River water without an entitlement. With respect to significant impacts, the SA/DEIS proposes that the Applicant replace 51,920 acre

⁵ SA/EIS, p. C.9-89.

⁶ SA/EIS, p. C.9-47.

feet of water that will be pumped from the Colorado River over the life of the Project. However, the Applicant has not identified the water source that will replace 51,920 acre feet of water taken from the Colorado River, nor has the Applicant demonstrated that it has a legal entitlement to Colorado River water in the first place. The SA/DEIS essentially proposes to replace 51,920 acre feet of Colorado River with nonexistent water.

The SA/DEIS' proposal for replacement of 51,920 acre feet of water from the Colorado River without identifying a replacement water source is nonsensical and fails to satisfy the requirements of the California Environmental Quality Act ("CEQA"). First, deferral of the formulation of mitigation measures to some future time is generally impermissible under CEQA.⁷ A lead agency is prohibited from making CEQA findings that rely on mitigation measures of uncertain efficacy or feasibility.⁸ Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.⁹ This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."¹⁰

Second, CEQA requires that the SA/DEIS include an analysis of potential environmental impacts associated with replacing 51,920 acre feet of water. Where mitigation measures would, themselves, cause significant environmental impacts,

⁷ CEQA Guidelines § 15126.4(a)(1)(B).

⁸ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728.

⁹ CEQA Guidelines § 15126.4(a)(2).

¹⁰ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) Cal.3d 929, 935.

CEQA requires an evaluation of those secondary (indirect) impacts.¹¹ Furthermore, before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases and components of a project.¹²

The SA/DEIS must (but does not) fully describe and evaluate potentially significant impacts from the Project's replacement of 51,920 acre feet of water taken from the Colorado River. Until the Project can demonstrate compliance with LORS and an entitlement to Colorado River water, the Applicant's proposal to pump groundwater for power plant cooling remains a significant, unresolved issue. Also, until the Applicant can identify sufficiently concrete mitigation for significant impacts to the Colorado River so that it is clear what the proposed mitigation is, how it will be implemented, and whether the mitigation will result in further significant impacts, the Applicant's proposal to pump groundwater for power plant cooling remains a significant, unresolved issue.

Biological Resources

There are also many significant, unresolved issues related to the Project's significant impacts and proposed mitigation for biological resources. First, the SA/DEIS explains that the Applicant's rare plant survey effort does not provide an adequate basis for determining impacts to rare plants on the Project's impact area. The environmental setting is the "physical environmental conditions in the vicinity

¹¹ CEQA Guidelines § 15064(d).

¹² *Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d at p. 396-97 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).

of the Project, as they exist at the time the notice of preparation is published.”¹³

“The environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.”¹⁴

In order for the Committee to make the findings required for certification of the Project (e.g., compliance with all laws and regulations, and adequate mitigation of impacts), the results of the surveys must be analyzed and any significant impacts that are identified must be avoided or mitigated, as feasible.

The SA/DEIS makes clear that the Applicant failed to conduct surveys for four rare plant species during the appropriate time of year. Therefore, the Applicant must complete late-summer/early-fall floristic surveys in order to establish the environmental baseline for the Project site. Although the SA/DEIS attempts to analyze the impacts and formulate mitigation measures, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to rare plants are actually identified through an adequate survey effort. Hence, the SA/DEIS does not (and simply cannot at this point) provide an adequate description of the environmental setting, analysis and identification of mitigation for these biological resources. Once the Applicant submits the results of the late-summer/early-fall rare plant surveys and all parties have an opportunity to review this analysis, the SA/DEIS must be revised and recirculated to the public. Finally, testimony and evidentiary hearings on impacts to rare plants cannot occur until a revised SA/DEIS is prepared.

¹³ CEQA Guidelines § 15125.

¹⁴ *Id.*

Another significant, unresolved issue related to biological resources involves the Applicant's failure to provide sufficient information to enable Staff to determine consistency with LORS or potentially significant impacts with respect to the golden eagle. The SA/DEIS acknowledges that the Project may "take" golden eagles, requiring a permit from the U.S. Fish and Wildlife Service ("USFWS"), pursuant to the Bald and Golden Eagle Protection Act. However, the SA/DEIS finds that the Applicant failed to conduct focused spring surveys for golden eagle nest sites or breeding pairs and failed to assess whether the Project site is used by wintering golden eagles. Therefore, the SA/DEIS does not make a finding regarding consistency with the Bald and Golden Eagle Protection Act, as required by the Warren-Alquist Act.¹⁵

Golden eagles are protected under the Bald and Golden Eagle Protection Act.¹⁶ USFWS recommends that the Applicant conduct nest surveys for the golden eagle in the spring of 2010.¹⁷ Since these surveys would only now be occurring, the SA/DEIS does not include any analysis of potentially significant impacts to golden eagles or any analysis of compliance with LORS. Since the Applicant also failed to assess whether the Project site is used by wintering golden eagles, this information also must be provided. Testimony and evidentiary hearings on impacts to golden eagles cannot occur until the Applicant submits the results of the surveys to the parties and USFWS and Staff independently analyzes the data and prepares a revised SA/DEIS to the public for review.

¹⁵ SA/EIS, p. C.2-5.

¹⁶ 50 C.F.R. 22.26.

¹⁷ SA/EIS, p. C.2-81.

Another significant, unresolved issue related to biological resources involves the Applicant's failure to provide sufficient information on Couch's spadefoot toads to enable Staff to determine consistency with LORS or potentially significant impacts. The SA/DEIS states that the Applicant's surveys for Couch's spadefoot toads, a California Species of Special Concern, "were not conducted during the proper season (i.e., after summer rains)."¹⁸ Thus, the SA/DEIS requires additional surveys to identify potential spadefoot toad breeding habitat.¹⁹ Testimony and evidentiary hearings on impacts to Couch's spadefoot toad cannot occur until the Applicant submits the results of the surveys to the parties and Staff independently analyzes the data and prepares a revised SA/DEIS to the public for review.

Conclusion

In sum, despite the release of the SA/DEIS, CURE's preliminary analysis reveals gaping holes in the data, analyses, and mitigation measures for core issues in this case. Most notable is the complete lack of mitigation related to the Project's proposal to use groundwater for power plant cooling. The SA/DEIS does not identify mitigation to address the Project's inconsistencies with State water policies, does not address the remedy for use of Colorado River water without an entitlement, and does not identify mitigation for significant impacts to 51,920 acre feet of adjudicated Colorado River water. Until the Applicant provides threshold information, and the SA/DEIS' analyses and mitigation measures are revised and recirculated for the public's and the parties' review, it would be unreasonable for the

¹⁸ SA/EIS, p. C.2-36.

¹⁹ SA/EIS, p. C.2-78.

Applicant to expect the Commission, Staff, and other parties to expend valuable resources on testimony and evidentiary hearings.

Dated: April 1, 2010

Respectfully submitted,

/s/

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Attorneys for the CALIFORNIA
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DECLARATION OF SERVICE

I, Carol N. Horton, declare that on April 1, 2010, I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY STATUS REPORT NUMBER 3** dated April 1, 2010. The original document, filed with the Docket Office, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
http://www.energy.ca.gov/sitingcases/genesis_solar.

The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission's Docket Unit via email and by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred."

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California on April 1, 2010.

/s/

Carol N. Horton

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